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No. 99-6723

THE SUPREME COURT OF THE UNITED STATES OF AMERICA

ANTHONY BRADEN BRYAN,
Petitioner,

-vs-

MICHAEL MOORE,
Secretary, Florida Department of Corrections,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF UNITARIAN UNIVERSALISTS AGAINST THE DEATH PENALTY AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Did the Florida Supreme Court err in determining that the presence or absence of conscious pain once electrocution begins is the only factor which determines whether or not Florida's use of the electric chair constitutes cruel and unusual punishment under the Eight Amendment?

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INTEREST OF THE AMICUS CURIAE

Unitarian Universalists Against the Death Penalty ("UUADP") is an independent affiliate of the Unitarian Universalist Association ("UUA").[1] UUADP was organized in 1996 to effectuate resolutions of the UUA calling for an end to capital punishment.

UUADP, as *amicus curiae,* adheres to the fundamental belief that the death penalty is inconsistent with UUADP's stated principle to affirm and promote the inherent worth and dignity of every individual. Florida's use of the electric chair is particularly abhorrent in the light of this principle. UUADP has members in thirty-nine of our United States of America.

SUMMARY OF ARGUMENT

Cruelty in the justification for execution is as constitutionally impermissible as cruelty in the method of execution.

Florida's continued use of the electric chair, despite its exoneration of nineteen death row inmates since 1973, evidences a cruelty in Florida's justification for execution.

Hence, the Florida Supreme Court erred when it determined that the presence of conscious pain once electrocution begins is the *only* factor, which determines whether Florida's continued use of the electric chair violates the cruel and unusual punishments clause.

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[1] Pursuant to Rule 37.3 of the Rules of the Supreme Court of the United States, the parties have consented to the filing of this *Amicus Curiae* brief. Their letters of consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, Unitarian Universalists Against the Death Penalty state that counsel for *amicus curiae* authored the brief in whole and no party made a monetary contribution to the preparation or submission of this brief other than *amicus curiae* and its counsel.

ARGUMENT

The Florida Supreme Court erred when it determined that the presence of conscious pain once electrocution begins is the *only* factor which determines whether Florida's continued use of the electric chair violates the cruel and unusual punishments clause of the Eighth Amendment to the United States Constitution.

Although, "[p]ain, certainly, *may* be a factor in the judgment [emphasis added]," Furman v. Georgia, 408 U.S. 238, 271, 92 S. Ct. 2726, 2742 (1972) (Brennan, J., concurring), "this Court has never held that pain is the exclusive consideration under the Eighth Amendment." Campbell v. Wood, 511 U.S. 1119, 114 S. Ct. 2125, 2127 (1994) *cert. denied*, (Blackmun, J., dissenting). What other considerations may be relevant under the Eighth Amendment, depend, of course, upon the meaning of the cruel and unusual punishments clause.

Although "difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted," Wilkerson v. Utah, 99 U.S. 130, 135-36 (1879), and "the ban on "cruel and unusual punishments" is one of the most difficult to translate nto judicially manageable terms," 408 U.S. at 376 (Burger, J., dissenting), this Court has accepted that "the execution of a legally and factually innocent person would be a constitutionally intolerable event." Herrera v. Collins, 506 U.S. 390, 419, 113 S. Ct. 853, 870 (1993) (O'Connor, J., concurring). Hence, evidence of legal and factual innocence would certainly be relevant to the determination of whether a punishment comports with the cruel and unusual punishments clause of the Eighth Amendment.

A. CRUELTY IN THE JUSTIFICATION FOR ELECTROCUTION IS AS CONSTITUTIONALLY IMPERMISSIBLE AS CRUELTY IN THE METHOD OF EXECUTION.

"Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital, must be capable of wider application than the mischief which gave it birth." Weems v. United States, 217 U.S. 349, 373, 30 S. Ct. 544, 551 (1910). Presently, "mischief" exists in the form of "exercises of cruelty by laws other than those which inflicted bodily pain or mutilation." Indeed, in the State of Florida, "unlimited legislative power, itself, [has become] tempted [by] cruelty." Id.

"The objective in imposing [the death penalty] must" comport with human dignity. Gregg v. Georgia, 428 U.S. 227, 240, 96 S. Ct. 2971, 2977 (1976) (Marshall, J., dissenting). "More than the presence of pain, however, is comprehended in the judgment that the extreme severity of a punishment makes it degrading to the dignity of human beings." Furman v. Georgia, 408 U.S. 238, 271, 92 S. Ct. 2726, 2742 (1972) (Brennan, J., concurring).

Today, a new "mischief" has raised its ugly head. Since 1973, David Keaton, Wilbert Lee, Freddie Pitts, Delbert Tibbs, Annibal Jaramillo, Anthony Brown, Joseph Green Brown, Anthony Ray Peek, Juan Ramos, Willie Brown, Larry Troy, William Jent, Earnest Miller, Robert Cox, James Richardson, Bradley P. Scott, Andrew Golden, Robert Hayes, and Sonia Jacobs have all been exonerated from Florida's death row.[2] Sonia Jacobs was convicted of murder and sentenced to death along with her accomplice, Jesse Tafero. Ms. Jacobs was exonerated and released from death row in 1992. Mr. Tafero was electrocuted by the State of Florida in 1990. Although these data may not conclusively establish a cruel and unusual punishment,[3] they certainly pertain to

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[2] This data was provided by the Death Penalty Information Center, Richard C. Dieter, Executive Director.

[3] A death row inmate is never "innocent" under the definition of innocence espoused in Herrera v. Collins, 506 U.S. 390, 399, 113 S. Ct. 853, 859 (1993).

the determination of whether Florida's continued use of the electric chair creates a constitutionally unacceptable risk that a "legally and factually innocent person" may be electrocuted.

The cruel and unusual punishment clause was not intended to "prevent only an exact repetition of history." Weems, 217 U.S. at 372. Instead, the clause protects individuals from the unlimited power of the state to punish individuals without accountability to the very concept of human dignity, which underlies our Eighth Amendment.

Moreover, the protections afforded by the cruel and unusual punishments clause are not limited to methods of punishment alone because "[c]ruelty [has] become an instrument of tyranny; of zeal for a purpose, either honest or sinister." Id. at 374. Indeed, considerable conceptual difficulty would accompany any attempt by the State of Florida to assert that pain is the sole factor relevant to the Court's determination of whether electrocution is unconstitutional. Due to the fact that cruelty in the justification for electrocution is as constitutionally impermissible as cruelty in the method of execution, the Supreme Court of Florida erred when it held that conscious pain once electrocution begins is the *only* factor which determines whether Florida's use of the electric chair violates the cruel and unusual punishments clause of the Eighth Amendment.

B. SINCE THE VALIDITY OF RETRIBUTION AS A JUSTIFICATION FOR EXECUTION IS DEPENDENT UPON GUILT, EXONERATION RATES FACTOR INTO THE DETERMINATION OF WHETHER FLORIDA'S USE OF THE ELECTRIC CHAIR VIOLATES THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE.

Retribution is a legitimate justification for punishment, Callins v. Collins, 510 U.S. 1141, 114 S. Ct. 1127, 1128 (1994)

Therefore, neither Anthony Bryan nor the nineteen inmates exonerated from Florida's death row are "innocent."

cert. denied, (Scalia, J., concurring).[4] Retribution "serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy--of self-help, vigilante justice, and lynch law." Furman, 408 U.S. at 308 (Stewart, J., concurring).

However, retribution without guilt is as constitutionally impermissible as punishment without justification. Herrera, 506 U.S. at 433-34.[5]

> "Men may punish for any number of reasons, but the one reason that punishment is morally good or morally justifiable is that someone has broken the law. Thus, it can correctly be said that breaking the law is the *sine qua non* of punishment, or, in other words, that we may only tolerate punishment as it is imposed on one who deviates from the norm established by the criminal law."

Furman v. Georgia, 408 U.S. 238, 342-43, 92 S. Ct. 2726, 2742 (1972).

The finality of the electric chair provokes the relevance of Florida's exoneration rate. "There is simply no possibility of correcting a mistake." Heiney v. Florida, 469 U.S. 920, 921, 105 S. Ct. 303, 304 (1984) *cert. denied*, (Marshall, J., dissenting). "The horror of sending an innocent defendant to death is thus qualitatively different from the horror of falsely imprisoning that defendant." Heiney, 469 U.S. at 921. Certainly, "[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person."

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[4] "[I]f [the people] merely conclude that justice requires such brutal deaths to be avenged by capital punishment; the creation of false, untextual, and unhistorical contradictions within "the Court's Eighth Amendment jurisprudence" should not prevent them." Callins v. Collins, 510 U.S. 1141, 114 S. Ct. 1127, 1128 (1994) *cert. denied*, (Scalia, J., concurring).

[5] "The legitimacy of punishment is inextricably intertwined with guilt." Id.

Patterson v. New York, 432 U.S. 197, 208, 97 S. Ct. 2319, 2326 (1977). Nevertheless, the possibility of electrocuting a "legally and factually innocent person" *at least* factors into the determination of whether Florida's continued use of the electric chair violates the cruel and unusual punishment clause of the Eighth Amendment.

Although, the cruel and unusual punishments clause draws its meaning from "evolving standards of decency that mark the progress of a maturing society," Trop v. Dulles, 356 U.S. 86, 101, 78 S. Ct. 590, 599 (1958), public attitude alone is inconclusive of evolving standards of decency, unless the punishment condoned comports with human dignity. Gregg, 428 U.S. at 173, clearly, human dignity is the "basic concept underlying the Eighth Amendment." Trop, 356 U.S. at 100. "If retribution alone could serve as a justification for any particular penalty, then all penalties selected by the legislature would by definition be acceptable means for designating society's moral approbation of a particular act." Furman, 408 U.S. at 344.

The concept of human dignity underlying the Eighth Amendment requires consideration of exoneration rates. Such contemplation should have been undertaken by the Supreme Court of Florida in rendering its decision in Provenzano v. Moore, No. 95, 973 (Fla. 1999). The Florida Supreme Court's exclusive inquiry into conscious pain extrapolated human dignity from the cruel and unusual punishments clause and acquiesced to the apparent public acceptance that a factually and legally innocent person may have to be executed in order to satisfy public outrage.

The Florida Supreme Court's exclusive focus on conscious pain was erroneous because cruelty in the justification for Florida's use of the electric chair is as constitutionally impermissible as cruelty in the method of execution. If the only factor relevant to the determination of whether Florida's use of the electric chair constitutes cruel and unusual punishment was the presence or absence of conscious pain once electrocution begins, then execution of a factually and legally innocent person would comport with the Eighth Amendment so long as their death was painless.

Certainly the concept of human dignity, which underlies our Eighth Amendment, would not countenance such a result.

CONCLUSION

Cruelty in the justification for electrocution is as constitutionally impermissible as cruelty in the method of execution. Since the validity of retribution as a justification for punishment depends upon guilt, exoneration rates in the State of Florida factor into the determination of whether the use of the electric chair in that state violates the cruel and unusual clause of the Eighth Amendment to the United States Constitution.

The Supreme Court of Florida has held that pain once electrocution begins is the only factor relevant to the determination of whether Florida's use of the electric chair constitutes a cruel and unusual punishment. In light of the constitutionally intolerable event that a factually and legally innocent person be executed, certainly other factors such as the exoneration of nineteen inmates from Florida's death row since 1973, are relevant to the determination of whether Florida's use of the electric chair violates the cruel and unusual punishment clause.

For the foregoing reasons, *amicus curiae*, Unitarian Universalists Against the Death Penalty respectfully submit that this Court reverse the Florida Supreme Court's decision in Provenzano v. Moore, No. 95, 973 (Fla. 1999).

Respectfully submitted,

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